PERBADANAN GETAH FELDA

v.

THE PACIFIC BANK BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D3-22-373-89]
14 JUNE 1991

CONTRACT: *Communication - Whether acceptance or counter offer - Determination of the terms of the contract - Damages in lieu of specific performance.*

CONTRACT: *Performance guarantee - Consideration for the guarantee - Whether there is a concluded contract or whether there was a binding contract of guarantee - Issue of due delivery of the said guarantee - Evidence of banking practice to determine issues.*

The two suits were consolidated and both appeals were heard together in open Court.

In one case the plaintiff sued the defendant (Dah Giap) for specific performance of a contract identified as contract No. DL 344 to purchase 960 metric tons of Latex or for damages in lieu of specific performance. Felda took out an O. 81 r. 1 application and obtained an order for damages in lieu of specific performance, the damages to be assessed. Dah Giap appealed.

In the other case the plaintiff sued the defendant bank (the bank) for RM400,000 (and interest and costs) as being payable under a performance guarantee said to have been provided by the bank to Felda guaranteeing payments by Dah Giap pursuant to the contract. The subject of action upon which Felda obtained an O. 14 application against the bank. The bank appealed.

The plaintiff alleged that there was a contract relied on a telefax dated 12 October 1988 and exchange of documents on the basis of this communication for the purchase of 960 metric ton "wet centrifuged Latex" (60% DRC) by the defendants and a performance guarantee given by the defendant bank by virtue of the contract.

The issue before the Court was whether there was a binding contract between Felda and Dah Giap and whether the purported exchange documents raised triable issues.

The other issue was whether the delivery of the bank guarantee entitled "customer's copy" letter (required to be delivered upon contract) to FELDA was due delivery

Held:

[1] To get on with the purchase contract could mean implement it or it could mean prepare it and have it ready for execution. That letter meaning however does not *per se* amount to the qualification that the acceptance was subject to contract.

[2] There is no need for a trial to conclude as the conduct of the parties gathered from exchange of the written communication that were placed before the Court that which have been looked into here before, clearly show that both Dah Giap and Felda intended to bind themselves by a contract in the terms, and had infact considered themselves bound by agreement after the offer was accepted by Dah Giap sending their telefax of that same date to Felda.

[3] Dah Giap expected Felda to get on with the implementation of the contract and on their part there was only one thing left for them to do and that was to provide the required

guarantee for RM400,000 - "upon contract". It is clear that they understood the time to perform that promise to provide the guarantee had already come to pass. They asked for and obtained an extension of time to provide the guarantee, obtained the guarantee from the Pacific Bank Bhd. and purported to meet their obligation by sending their letter of 31 October 1988 together with the enclosed document. This demonstrate beyond any argument that Dah Giap accepted. There was a contract.

[4] With the acceptance of the contract, Clause (vi) of the Appendix to the offer of 13 October 1988 became a promise on the part of Dah Giap. The performance of which was to be effected by the provision of the bank guarantee. Section 64 of the Contract Act *inter alia* empowers every promise to extend the time for such performance or accept instead of it, any satisfaction which is fit.

[5] Even assuming there was no extension of time to perform and in event there was no performance of that promise, the contract is not *per se* invalidated. Section 56 of the Contract Act provides that it is voidable and only at the instance and option of the promisee, in this case Felda.

[6] If the bank was aware that the customer's copy was delivered to Felda and that such delivery was held out to be due delivery, then it could be urged with much force that the bank is estopped from denying it. But if the bank was not aware of what Dah Giap had done then obviously no such estoppel arises. The claim against the bank was not suitable for summary disposal.

[Dah Giap's appeal dismissed with costs. Bank's appeal allowed with costs. Bank given unconditional leave to defend.]

Case referred to:
Lewis v. Brass [1877] 3 QBD 667

Legislation referred to:
Contracts Act 1950, ss. 56, 64

For the plaintiff - S. Kulasegaran, Rajendra Kulasegaran; M/s Ranjit, Thomas & Kula
For the defendant - S.K. Yeoh; M/s. Wang Kuo Shing & Co.

JUDGMENT

VC George J:

In Civil Suit No. D2-22-376-89 the plaintiff (Felda) sued the defendant (Dah Giap) for specific performance of a contract identified as Contract No. DL 344 to purchase 960 metric tons of latex or for damages in lieu of specific performance. Felda successfully took out an O. 81 r. 1 application and obtained an order for damages in lieu of specific performance, the damages to be assessed. Dah Giap's appeal is encl. (10).

In Civil Suit No. D3-22-373-89 the plaintiff (Felda) sued the defendant bank (the bank) for RM400,000 (and interest and costs) as being payable by the bank to Felda under a performance guarantee said to have been provided by the bank to Felda guaranteeing payments by Dah Giap pursuant to the contract the subject of the action in D2-22-376-89. Felda successfully took out an O. 14 application against the bank. The bank's appeal is encl.(22).

The two suits were consolidated and both the appeals were heard together in open Court. Conveniently all the cause papers were bound and placed in the Court file as bundle BP with its pages marked from BP1 to BP190. In respect of documents referred to in this judgment

the relevant cross reference in the Bundle BP will be given. I propose to first deal with the Dah Giap appeal:

For Dah Giap, Counsel submitted that whether or not there was a binding contract between Felda and Dah Giap was a *bona fide* triable issue.

To establish the alleged contract Felda relied on a telefax dated 12 October 1988 said to have been sent by Dah Giap to and received by Felda on 13 October 1988. It is BP85. Attached to BP85 were a document giving fairly comprehensive details of Dah Giap including names of its shareholders, directors and bankers, a photocopy of Dah Glap's manufacturing licence and a photocopy of its licence to deal in and store rubber issued by the Rubber Exchange and Licensing Board.

The contents of BP85 are reproduced:

> En Abdul Manaf Yunos
> Manager - Marketing,
> Perbadanan Getah Felda,
> Kuala Lumpur.
>
> Re: Purchase of 60% DRC Centrifuged Latex Dah Giap Rubber Industries Sdn. Bhd.
>
> Further to the telephone conversation between your goodself/Mr. Cheo, please be advised that the abovementioned company is keen/agreeable to purchase 960 metric tons of centrifuged latex (60% DRC) at the premium of RM4.20 per dry kg commencing from January 1989 to December 1989 at the volume of 80 metric tons per month.
>
> Enclosed herewith are relevant documents for your kind perusal and attention.
>
> If you are agreeable to the aforesaid, please confirm sale by return fax to the following, your official sale contract/offer together with a copy of your standard performance bond for our further action.
>
> Mr. Tay Chin Eng.
> Fax No. 03-7763845
> Thank you
> Regards
> 12 October 1988.

On the same day that the fax BP85 was said to have been received by Felda, that is, 13 October 1988, Felda sent a telefax message to Dah Giap. This is BP91. It is as follows:

> Date 13 October 1988
>
> Refer YR Fax dated 13 October 1988 we confirm sold to you 960 metric ton wet centrifuged latex (60% DRC) on premium basis of MCTS 420 pkd premium for delivery to your factory commencing from January 89 to December 89 at the volume of 80 metric tons per month.
> Other term and condition is as per our appendix attached.
> T.U. for the biz N kindly

Attached to BP91 was the appendix (BP92) referred to therein. It is relevant to note that it was entitled:

> Appendix
> Contract No. DL 344
> Buyer: Dah Giap Rubber Industries Sdn. Bhd.

Some of the other particulars given in the appendix include a formula for computing the purchase price of the latex and that payment was to be made "cash before delivery". There was also a provision for a bank guarantee *viz:*

> (vi) Upon contract buyer must establish a deposit of up to 10% of the total contract value (that is RM400,000) in the form of bank guarantee. The bank guarantee (as per the sample) attached must reach us latest by 22 October 1988. The bank guarantee will be returned upon completion of the contract.

Dah Giap's response was immediate. On the same day 13 October 1988, they sent Felda a telefax message numbered F51/10/88 in Bahasa Malaysia BP93 which is reproduced:

> Tarikh 13 Oktober 1988.
>
> Perbadanan Getah Felda,
> Tingkat 12, Menara Boustead,
> 69 Jalan Raja Chulan,
> 50200 Kuala Lumpur.
>
> U/P: Encik Manaf Yunus
>
> Tuan,
>
> Bersetuju Menerima Tawaran Membeli 960 Metric Ton "Wet Centrifuged Latex" (60% DRC) untuk kami, Dah Giap Rubber Industries Sdn. Bhd.
>
> Merujuk kepada Kontrak No. DL 344 dan juga Fax message tuan yang bernombor F51/10/88 di sini dengan resminya kami menerima tawaran tersebut.
>
> Sila lanjutkan semua proses pembelian dan Kontrak belian ini.
>
> Sekian terima kasih.
> yang benar,
> Dah Giap Rubber Industries Sdn. Bhd.
>
> Sd: Tay Chin Eng
> Director.

One of the two translations of this message submitted to the Court is a BP93B:

> Agreement of acceptance of tender for the purchase of 960 metric ton of "Wet Centrifuged Latex" for us Dah Giap Rubber Industries Sdn. Bhd.
>
> Referring to Contract No. DL 344 and also your Fax Message No. F5/10/88, we hereby officially accept/receive the above offer.
>
> Please proceed with all purchasing processes and the Purchase Contract.
>
> Thank you.
> Yours faithfully,
> Dah Giap Rubber Industries Sdn. Bhd.
> Sd: Tay Chin Eng
> Director.

En. Abd Manaf Yunus, the executive with Felda dealing with the case, in his affidavit affirmed on 13 October 1989 and filed in the action against Dah Giap states at BP113 that on 21 October 1988 Dah Giap had secured the consent of Felda to extend the time for delivery of the bank guarantee. For purported confirmation of this Felda relied on Dah Giap's letter of 21 October 1988 which is BP117 the contents of which certainly suggest that an understanding had been reached for Dah Giap to provide the bank guarantee later than the 22 October 1988. Felda was further provided by Dah Giap with the Pacific Bank Bhd's. letter of 21 October

1988 by which the bank confirmed that the bank guarantee for RM400,000 was being prepared and was on its way. On 31 October 1988, Dah Giap sent their letter of that date to Felda the contents of which are at BP119 and are reproduced:

> 31 October 1988
>
> Felda Rubber Corporation
> Tingkat 12, Menara Boustead
> 69 Jalan Raja Chulan
> 50200 Kuala Lumpur
> Attention: Mr. Teo Lay Liang
>
> Dear Sir,
>
> Re: Sale Contract No. DL 344
>
> We are pleased to forward herewith for your kind attention, a performance guarantee of RM400,000 in respect of your contract No. DL 344.
>
> We apologise for the delay and look forward to sign the abovesaid contract.
>
> Yours faithfully,
> Dah Giap Rubber Industries Sdn. Bhd.
> Sd: Kathleen Tay
> Director.

The bank guarantee enclosed with the letter was clearly held out to be the bank guarantee (required to be delivered upon contract) by the delivery of which Dah Giap seemed to be performing its promise contained in the said Clause (vi) of the Appendix to Felda's offer. It turned out that the bank guarantee was endorsed "customer's copy". It was however addressed to Felda and was apparently duly executed by the bank's authorised signatories.

It turned out that there had been more than one executed copy of that bank guarantee. By letter dated 7 November 1988 that is, a week after 31 October 1988, Dah Giap informed the bank that it had not utilised the bank guarantee and required the bank to cancel the guarantee. What was said to be the original copy of the bank guarantee was attached to the letter. Dah Giap's letter has the following paras.

> After we gathered certain information and your timely advice which we appreciated a lot, we have decided not to sign up the sales contract with Felda Rubber Corp. As such, we hope you could rebate the commission charged on this guarantee, that is, RM4,160 as it has not been utilised yet.
>
> On the other hand, we would like to establish a performance guarantee of RM300,000 in favour of Dynamic Plantations Sdn. Bhd. for supplying of latex for the year 1989.

The bank, on 11 November 1988, endorsed the original copy with the words "cancelled". It would seem that neither the bank nor Dah Giap informed Felda of Dah Giap's decision "not to sign up the sales contract" nor of the purported cancellation of the bank guarantee. The "customer's copy" was left with Felda.

On the 27 December 1988, Felda sent to Dah Giap a written contract in respect of "Sale Contract No. DL 344" for execution by Dah Giap. Dah Giap's reply to Felda dated 29 December 1988, is at BP50:

> Re: Sale Contract No. DL 344
>
> We are surprised to receive your abovementioned contract on 27 December 1988 for signatories.

We understood from your fax message No. F51/10/88 dated 13 October 1988, that the contract was invalidated on 22 October 1988 and hence return herewith the said contract for your attention.

Thank you.

Yours faithfully,
Dah Giap Rubber Industries Sdn. Bhd.
Sd: Kathleen Tay
Director.

Felda's reaction to this was to refer the matter to its solicitors who by letter of demand dated 9 January 1989, required Dah Giap to specifically perform what they contended was a concluded contract for the purchase of the 960 metric tons of latex. By letter of demand dated 23rd January 1989, Felda's solicitors required the bank to pay up on the bank guarantee of 31 October 1988.

There was an attempt to suggest that the original telefax of 12 October 1988, exhibited as BP85 although on Dah Giap's letterhead was not sent by Dah Giap and that in any event whether it was, is a triable issue. Something was also attempted to be made of the fact that although the fax bore the name of one of Dah Giap's directors as the sender, it was not signed. The contents of the documents attached to BP85, the other written communications between Dah Giap and Felda including communications which bear the signature of Tay Chin Eng and the fact of which communication is not disputed show beyond a reasonable doubt that the original communication BP85 must have been authorised and sent by or under the authority of Tay Chin Eng in his capacity as a director of Dah Giap. The submission that whether BP85 was sent by Dah Giap is a triable issue borders on being frivolous and vexatious. It has no merit and is rejected.

In any event whether BP85 was sent or not is not really relevant in view of what transpired after it was received by Felda. Felda's fax BP91 was sent to Dah Giap. It was a counter offer and as such any effect or real value BP85 may have had ceased to be relevant. BP91 has to be read with its appendix and amounts to a comprehensive offer covering all relevant aspects for the sale of the latex including quality, period within which delivery is to be made, the amount to be supplied and accepted each month (delivery to be made at Dah Giap's factory), the price (by applying a formula all the ingredients of which are set out in the appendix), and with the provision that the payment is to be made "cash before delivery".

In my judgment BP93 was an unqualified acceptance of the offer contained in BP91 read with its appendix. The one sentence second para. of the document does not qualify the acceptance. One translator has it as "please forward all processed purchases and this purchase contract" while the other has it as "please proceed with all purchasing processes and the purchase contract". The key word is "lanjutkan". The Kamus Lengkap deals with the word "melanjutkan" thus = "continue, prolong, lengthen, protract, resume, **go on with"** (emphasis supplied). To translate "lanjutkan" as meaning "forward" in the sense of "send" or "deliver" seems to me to stretch the meaning of the word too far. Further "lanjutkan" in the sentence covers both "semua proses belian" and "Kontrek belian ini." To "forward this purchase contract" could make sense but "to forward processed purchases" does not.

I accept that what that sentence in effect states is that Felda is to proceed with or get on with (to use the phrase in the kamus) all the purchasing processes and to proceed or to get on with the purchase contract. To get on with the purchase contract could mean implement

it or it could mean prepare it and have it ready for execution. That latter meaning however does not *per se* amount to the qualification that the acceptance was subject to contract.

In *Lewis v. Brass* [1877] 3 QBD 667 it was held that:

> An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language.

In *Morrel v. Studd & Millington* (2) the principle was put thus:

> ... the mere fact that the parties may have agreed at the time or subsequently to the agreement in question that a more formal document should be prepared is not sufficient to prevent the contract being sued upon, if they in fact intended to bind themselves by a contract the terms of which are contained in the note or memorandum in question signed by the party to be charged or his agent.

The terms of the para numbered (vi) in the appendix to BP91 has been earlier noted. The bank guarantee was to be delivered "upon contract" to reach Felda not later than 22 October 1988. It has also earlier herein been noted that Dah Giap appears to have sought an extension of a week to provide the required bank guarantee with reference to "Contract No. DL 344" stated as such as being the subject of Dah Giap's letter of 21 October 1988, by which the assurance that the guarantee would be provided was given. This was followed up with Dah Giap's letter of 31 October 1988 by which they purported "to forward herewith for your kind attention a performance guarantee of RM400,000 in respect of your contract No. DL 344." They were purporting to do that which, as has been noted, was to be done "upon contract".

In my judgment there is no need for a trial to conclude as I do that the conduct of the parties gathered from the exchange of the written communications that were placed before the Court and which have been looked into herebefore, clearly show that both Dah Giap and Felda intended to bind themselves by a contract in the terms set out in the offer of Felda contained in the Felda's telefax of 13 October 1988 read together with the appendix attached thereto and had in fact considered themselves bound by agreement after the offer was accepted by Dah Giap sending their telefax of that same date to Felda. Dah Giap expected Felda to get on with the implementation of the contract and on their part there was only one thing left for them to do and that was to provide the required guarantee for RM400,000 "upon contract". And it is clear that they understood the time to perform that promise to provide the guarantee had already come to pass. They asked for and obtained an extension of time to provide the guarantee, obtained the guarantee from the Pacific Bank Bhd. and purported to meet their obligation by sending their letter of 31 October 1988, together with the enclosed document.

In my judgment Dah Giap stating in their letter of 31 October 1988, that they were "looking forward to sign the abovesaid contract" amounted to no more than a suggestion to put into a formal form the agreement already arrived at. It is to be noted that by the first of the communications between the parties Dah Giap had asked "for confirmation of sale by fax together" with "official sale contract/offer ..." Felda came back, as has been seen, with an offer with the terms thereof set out comprehensively and couched in language that clearly shows that on acceptance of the offer there would be a contract between the parties. This was followed by the unqualified acceptance that has been considered earlier in this judgment. It was only "upon contract" that Dah Giap had to provide the guarantee. That it accepted that the guarantee was to be provided by 22 October 1988 and that it purported to provide

the guarantee by its letter of 31 October 1988, demonstrate beyond any argument that Dah Giap accepted that there was a contract.

The game is given away by the feebleness of the way Dah Giap tried to worm itself out of the contract. This was attempted to be done by the letter of its Director, Kathleen Tay, dated 29 December 1988 to Felda on receipt of the formal contract documents:

> Re: Sale Contract No. DL344
>
> We are surprised to receive your abovementioned contract on 27 December 1988 for signatories. We understood from your fax message No. F51/10/88 dated 13 October 1988 that the contract was invalidated on 22 October 1988 and hence return herewith the said contract for your attention.
>
> Thank you.
>
> Yours faithfully,
> Dah Giap Rubber Industries Sdn. Bhd.
> Sd: Kathleen Tay
> Director.

The feebleness of this attempt is highlighted by the inconsistency of its contents with the contents of the Dah Giap letter of 21 October 1988 signed by another director Tay Chin Eng and with Kathleen Tay's letter of 31 October 1988 expressing pleasure "to forward" ... a performance guarantee of RM400,000 in respect of your contract No. DL 344 ...

In my judgment there is no need for a trial to conclude, as I do, that the understanding that Kathleen Tay says they had that the "contract was invalidated on 22 October 1988" was so much without any basis whatsoever that it has to be concluded that neither Dah Giap nor any of its directors in fact understood that to have been the position.

Before moving on from that letter of 29 December 1988 it is relevant to pause to note that even that letter recognises the existence of the contract until it was "invalidated on 22 October 1988."

Clause (vi) of the Appendix to the offer of 13 October 1988 sets out a requirement to be met by Dah Giap. With the acceptance of the contract, that clause became a promise on the part of Dah Giap the performance of which was to be effected by the provision of the bank guarantee.

Section 64 of the Contracts Act *inter alia* empowers every promise to extend the time for such performance or accept instead of it, any satisfaction which he thinks fit. The written communication between the parties shows, as has been seen, that the promisee, Felda, had extended the time for performance of the promise to provide the bank guarantee and had accepted the guarantee purported to have been provided on 31 October 1988, in satisfaction of the requirement of Clause (vi) of the Appendix. Even assuming there was no extension of time to perform and that in any event there was no performance of that promise, the contract is not *per se* invalidated as suggested by Kathleen Tay. Section 56 of the Contracts Act provides that it is voidable and only at the instance and option of the promisee, in this case Felda. Felda did not exercise any right which it may have had to avoid the contract. On the contrary they insisted that the contract continued to subsist and demanded specific performance of it. The relevant portion of s. 56 is as follows:

> 56(1). When a party to a contract promises to do a certain thing ... and fails to do any such thing ... the contract or so much of it as has not been performed, becomes voidable at the option of the promisee ...

In my judgment Dah Giap's contention that there are triable issues is based on what are obviously frivolous contentions. There are no *bona fide* triable issues. The appeal should be dismissed.

As for the bank's appeal, the first of the two issues suggested as being triable issues was based on the contention that the consideration for the guarantee was the existence of a concluded contract between Felda and Dah Giap and that if there was no concluded contract or whether there was one or not, is a triable issue, then whether in fact there was a binding contract of guarantee was also a triable issue. In view of what has been concluded *vis-a-vis* the Dah Giap appeal, I hold that there is no merit in the first of the two contentions.

The second issue invited to be held to be a triable issue is the effect of delivery to Felda of what was entitled to be "customer's copy" of the guarantee. The bank's guarantee takes effect not when it was executed but upon it being duly delivered to the person in whose favour it is made out - In the instant case, Felda. What is due delivery is the real question that merits consideration. In the context of there being an original copy meant to be delivered to Felda with the customer's copy presumably meant to be retained by the customer, the question that arises is whether the delivery of the customer's copy to Felda was due delivery. And even if Dah Giap held it out to be due delivery, is that binding on the bank as being due delivery? It seems to me that if the bank was aware that the customer's copy was delivered to Felda and that such delivery was held out to be due delivery, then it could be urged with much force that the bank is estopped from denying it. But if the bank was not aware of what Dah Giap had done then obviously no such estoppel arises.

In my judgment these and other questions *vis-a-vis* the bank's position in this matter does not make the case against the bank as open and shut a case as it was as against Dah Giap. *Inter alia* evidence of what the banking practice is may be needed to assist the Court in adjudicating on the issues. The claim against the bank was not suitable for summary disposal.

The Dah Giap appeal encl. (10) in D2-22-376-89 is dismissed with costs. The bank's appeal encl. (22) in D3-22-373-89 is allowed with costs. The bank will have unconditional leave to defend.

Also found at [1992] 1 CLJ 485